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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1183

HAROLD P. ROBB, M.D., Individually and by His Successor in Office, C. DUANE HENSLEY, Ph.D., Director of the Department of Mental Health, and PATRICK J. GANNON, M.D., Individually and by His Successor in Office, SADASHIV D. PARWATIKAR, M.D., Superintendent, St. Louis State Hospital,

Petitioners,

v.

RICHARD KENNEDY,

Respondent.

SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN ASHCROFT
Attorney General

DANIEL P. CARD II
Assistant Attorney General

J. PAUL ALLRED, JR.
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

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Pursuant to Rule 24(4) and (5) of the Rules of this Court, petitioners respectfully submit the following supplement to their petition for writ of certiorari filed herein on February 26, 1977.

ADDITIONAL REASONS FOR GRANTING THE WRIT

A Conflict Exists Among the Circuit Courts of Appeals As to What Procedures Are Required by the Due Process Clause Before a Public Employer Can Suspend or Dismiss Civil Service System Employees.

Two circuits, the Fifth Circuit and the Eighth Circuit, which have examined the issue, have held that the Due Process Clause of the Fourteenth Amendment requires that there be pre-termination procedures in addition to a full post-termination evidentiary hearing before a civil service system employee can be suspended or dismissed. See *Thurston* v. *Dekle*, 531 F.2d 1264 (5th Cir. 1976), cert. pending No. 76-5224; and *Kennedy* v. *Robb* (this case). In addition, there is a decision of the United States District Court for the Northern District of Georgia, *Eley* v. *Morris*, 390 F.Supp. 913 (N.D.Ga. 1975) which has adopted similar requirements. All three have imposed similar pre-termination procedures which were provided by Congress when it adopted the United States Civil Service System. Each court has held that a post-termination hearing alone is not sufficient to comply with procedural due process as required by the Fourteenth Amendment.

The Ninth Circuit, however, in *Jacobs* v. *Kunes*, 541 F.2d 222 (9th Cir. 1976), cert. denied No. 76-791, February 22, 1977, has reached the exact opposite conclusion. That court upheld the civil service system of Maricopa County, Arizona, provided that there was a right to reinstatement with an award of full back pay if it was subsequently determined that the suspension or dismissal was

unjustified.[1] The merit system involved therein is extremely similar to Missouri's. There are no pre-termination procedures whatsoever. An employee is provided, prior to the dismissal, advance notice of the reasons for the action. Any employee who feels aggrieved by the suspension or dismissal may appeal to a merit system commission and will be afforded a full evidentiary hearing including the right to counsel, the right to present evidence and the right to cross examine the witnesses who testify against him. Any decision of the commission is subject to judicial review. (The specific statutes and rules and regulations involved therein are before this Court and were attached as an appendix to the respondent's brief in opposition to the petition for writ of certiorari.)

On appeal to the Ninth Circuit and in their petition for writ of certiorari, petitioners argued that this system was constitutionally defective because there were no pre-termination procedures which would provide the employee an opportunity to informally rebut the charges prior to the effective date of the suspension or dismissal (petition for writ of certiorari, pp. 5-8). This Court's attention was specifically directed to the *Eley* decision and to the lack of pre-termination procedures such as were present in *Arnett*.

Although the civil service system is different, the decision of the Fourth Circuit Court of Appeals in *Prince* v. *Bridges*, 537 F.2d 1269 (4th Cir. 1976) is also contrary to the decision of the Eighth Circuit. There, a civil service system employee was dismissed and was only provided the opportunity for a post-termination evidentiary hear-

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1. In Missouri, there is absolutely no doubt that a dismissed employee is entitled to back pay and attorney's fees if the dismissal was improper. *Wolf* v. *Missouri State Training School for Boys*, 517 S.W.2d 138 (Mo. Banc 1974).

ing. Under the procedures and statutes involved there, an employee serves at the pleasure of the appointing authority and may be dismissed if, in the discretion of the appointing authority, he believes that such action would be in the best interests of the agency. There are no pre-termination procedures prescribed whatsoever. The employee who is dismissed has the opportunity to appeal to a merit council and will be provided a post-termination evidentiary hearing. The decision of the merit council is advisory only and the appointing authority's decision after consideration of the council's recommendation is considered final.

The Fourth Circuit in holding that the employee's constitutional rights to procedural due process had not been violated stated:

"A constitutional guarantee of procedural due process arises when a public employee is discharged in violation of the procedural rules designed to protect him. In a situation he has a legitimate 'property' interest to protect. See *Arnett* v. *Kennedy, supra.* In the present case, however, the provisions of the merit plan have not been violated and Mrs. Prince has received the protection that the merit plan provides. Thus, *although Mrs. Prince contends that the merit plan itself fails to insure that arbitrary and unjustified terminations can be corrected by the Merit Council, we hold that she has not been deprived of a 'property' interest protected by the fourteenth amendment because she has received all of the protection the merit plan provides.* As recognized by the Supreme Court in *Arnett* v. *Kennedy*: 'Here the property interest which [the discharged employee] had in his employment was itself conditioned by the procedural limitations which accompanied the grant of that interest.' 416 U.S. at 155, 94 S.Ct. at 1645." Emphasis supplied)

Also, in f.n. 2, the Fourth Circuit in interpreting this Court's decision in *Arnett, supra,* indicated that a post-termination hearing is sufficient to provide an employee an opportunity to clear his name. This is in accord with an earlier Fourth Circuit decision. *Satterfield* v. *Edenton-Chowan Board of Education,* 530 F.2d 567 (4th Cir. 1975).

This is precisely the situation here. There was total compliance with the Missouri Merit System. The decision of the Eighth Circuit totally ignores this, however, and expands and enlarges upon respondent's expectations of continued employment which were established by state law and did not exist when he accepted employment. The Fourth Circuit on the other hand refused to expand upon a civil service employee's remedies beyond that provided in the merit system laws and regulations. The rationale of the Fourth Circuit is precisely the rationale adopted by the plurality opinion of this Court in *Arnett*—namely, a public employer in establishing an expectation of continued employment may at the same time prescribe the procedural means by which an employee may be suspended or dismissed and the procedural means by which it will be determined whether the suspension or dismissal was proper.

As a result of the conflict among the circuits, public employers are in a quandary. Those public employers residing in areas covered by the Fourth and Ninth Circuits do not have to provide any pre-termination procedures whatsoever for their employees. This is particularly the case since this Court denied certiorari in the Ninth Circuit case. On the other hand, public employers in areas

covered by the Fifth and Eighth Circuits must not only provide for a full post-termination hearing but must also adopt certain pre-termination procedures. The conflict must be resolved by this Court.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in petitioner's original petition for writ of certiorari, the writ should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

DANIEL P. CARD II
Assistant Attorney General

J. PAUL ALLRED, JR.
Assistant Attorney General

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